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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 61 and 69

[WC Docket Nos. 16-143, 05-25; GN Docket No. 13-5; RM 10593; FCC 19-66]

Business Data Services in an Internet Protocol Environment

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission eliminates ex ante pricing regulation for lower speed time division multiplexing (TDM) transport services offered by price cap regulated carriers nationwide, finding there is widespread competition in the marketplace, and abundant support in the record for removing the Commission's pricing regulations.

DATES: This final rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]**

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order on Remand, released on July 12, 2019. A full-text copy of this document may be obtained at the following internet address:

<https://www.fcc.gov/document/removing-unnecessary-regulation-transport-services-and-facilities-0>

I. BACKGROUND

A. BDS TDM Transport Services

1. The term business data services refers to the “dedicated point-to-point transmission of data at guaranteed speeds and service levels.” BDS offerings are fundamentally important to modern communities and economies. Over the last several decades, the Commission has repeatedly recognized the increasing competition for BDS services in areas of the country served by price cap LECs. Competition has grown even more markedly in recent years as cable operators increasingly compete for all aspects of BDS, including TDM transport. In response, the Commission has worked consistently to streamline regulation of such services to reflect this evolution.

2. In so doing, the Commission has characterized TDM transport services, which “involve carrying traffic from one point of traffic concentration to another,” as “low hanging fruit” for competitors because they can more easily justify competitive investment and deployment. In 1999, recognizing that burdensome pricing regulation is unnecessary and counter-productive where competitive pressure exists, the Commission granted pricing flexibility to price cap carriers for their BDS offerings, including their TDM transport services. The Commission provided two levels of pricing flexibility to price cap LECs offering BDS, including TDM-based transport services, keyed to the presence of competitive providers collocated at a price cap LEC’s wire centers. The Commission suspended further grants of pricing flexibility in 2012, pending the resolution of the BDS proceedings.

3. In 2017, after more than ten years of study and a massive data collection (the 2015 Collection), the Commission adopted an order comprehensively addressing the pricing regulation of BDS in price cap LEC areas. In the BDS Order, the Commission found, among other things, that competition for BDS TDM transport services was sufficiently pervasive to justify elimination of “all ex ante pricing regulation of price cap incumbent LEC provision of

TDM transport and other transport (i.e., non-end user channel termination)” services. In support of this conclusion, the Commission looked to the record evidence showing that “competitive providers have deployed competing transport networks in more than 95% of census blocks with [BDS] demand,” which included “about 99% of business establishments.” It also found that “in all price cap territories, 92.1 percent of buildings served were within a half mile of competitive fiber transport facilities” and that, “for all census blocks with business data services demand, 89.6 percent have at least one served building within a half mile of competitive LEC fiber.” This half mile is significant because, as the Commission concluded, most BDS providers are willing and able to profitably invest in and deploy facilities within a half mile of existing competitive facilities. In addition, the Commission found that buildings with BDS demand that were served only by an incumbent LEC were on average only 364 feet from the closest competitive LEC fiber facility.

4. After the Eighth Circuit Court’s partial remand of the BDS Order, finding that the Commission had not provided sufficient notice on the issue of eliminating ex ante pricing regulation for TDM transport, the Commission released the Second Further Notice, proposing to eliminate ex ante pricing regulation of price cap LECs’ BDS TDM transport and other transport (i.e., non-end user channel termination) services. The Commission received eight comments, six reply comments, and several filings memorializing various ex parte communications. Also, in the interest of ensuring a more complete analysis of competitive conditions affecting TDM transport services, the Commission conducted additional analysis of TDM transport services using data from the 2015 Collection. That analysis is focused on measuring the proximity of incumbent LEC wire centers to competitive fiber and shows that the vast majority of locations with BDS demand in price cap areas are served by wire centers that are no more than a half mile from competitive fiber. The Wireline Competition Bureau (Bureau) made that additional analysis available for public review and sought and received an additional seven comments and six reply

comments about those data tables (the April Data Tables). As a result of these two additional rounds of comments, we now have an even more robust record.

B. Forbearance Under Section 10 of the Act

5. Section 10 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (the Act) requires the Commission to forbear from applying any requirement of the Act or of our regulations to a telecommunications carrier or telecommunications service if and only if the Commission determines that: (1) enforcement of the requirement “is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;” (2) enforcement of that requirement “is not necessary for the protection of consumers;” and (3) “forbearance from applying that requirement is consistent with the public interest.” Forbearance is warranted only if all three criteria are satisfied.

**II. ELIMINATING EX ANTE PRICING REGULATION OF BDS TDM
TRANSPORT SERVICES OFFERED BY PRICE CAP LECs (REPORT AND
ORDER ON REMAND)**

6. After careful review of the record, we reaffirm the Commission’s previous decision to eliminate ex ante pricing regulation of TDM transport services in areas served by price cap LECs. The current record, even more so than the record that was before the Commission in 2017, demonstrates that widespread and ever-increasing competition in the supply of BDS transport makes ex ante pricing regulation of TDM transport in price cap areas both unnecessary and unduly burdensome. We therefore grant nationwide relief from ex ante pricing regulation of BDS TDM transport services in price cap areas, forbear from applying Section 203 tariffing requirements to these services, and adopt permissive detariffing for price cap LECs’ BDS TDM transport services for a transition period, followed by mandatory detariffing of these

services.

A. Competition for BDS TDM Transport

7. In finding that there is widespread and increasing competition for BDS TDM transport services in price cap areas, we rely in part on the evidence and analysis that was before the Commission in 2017 and also on evidence and analysis added to the record through two additional rounds of public comment following the Eighth Circuit Court's remand. Indeed, the additional submissions to the record have substantiated the reasonableness of the Commission's previous findings, and nothing in those submissions would cause us to modify the conclusions the Commission previously made concerning the state of competition for TDM transport services. As the Commission did in 2017, we find particularly persuasive the data that shows that as of 2013: (1) "competitive providers ha[d] deployed competing transport networks in more than 95% of census blocks with [BDS] demand" which included "about 99% of business establishments;" (2) "in all price cap territories, 92.1 percent of buildings served were within a half mile of competitive fiber transport facilities" and that, "for all census blocks with business data services demand, 89.6 percent have at least one served building within a half mile of competitive LEC fiber;" and (3) buildings with BDS demand that were served only by an incumbent LEC were on average only 364 feet from the closest competitive LEC fiber facility.

8. We continue to find that competitive suppliers with nearby fiber put competitive pressure on transport prices. As the Commission previously found, the record demonstrates that providers actively compete for customers located within about a half mile from their networks. That is because wireline providers of BDS are commonly willing to extend their existing networks a half mile or further to meet demand. Thus, the fact that 92.1% of buildings served with business data services in price cap areas were within a half mile of competitive fiber transport facilities and that, 89.6% of census blocks with BDS demand in price cap areas had at least one served building within a half mile of competitive LEC fiber, demonstrates the

widespread competitive pressure on TDM transport in price cap areas.

9. INCOMPAS disagrees and argues that the relevant measure of competition in the supply of TDM transport is the proximity of competitive fiber to incumbent LEC wire centers rather than the proximity of fiber to buildings with BDS demand. We find this argument to be misplaced. As the record demonstrates, while competitive LECs sometimes use transport links that are collocated at incumbent LEC wire centers, they often connect customers directly to their fiber facilities, effectively bypassing the incumbent LEC network. For example, cable operators compete with price cap incumbent LECs for transport services, but do not rely on interconnection with incumbent LEC wire centers to provide service. Commenters also observe competitors' increasing reliance on third party carrier hotels and data centers, which provide competitive LECs alternatives to incumbent LEC wire centers. Therefore, using the proximity of price cap LEC wire centers to competitive LEC fiber to measure the competitiveness of TDM transport would, by itself, understate the level of competition for TDM transport by failing to account for competition that bypasses incumbent LEC networks.

10. Moreover, we agree with commenters that argue that our decision to measure the proximity of buildings with BDS demand to competitive fiber is "both more granular and more comprehensive" than the competitive LECs' alternative proposal to measure the proximity of incumbent LEC wire centers to competitive fiber. Our metric assesses competition at approximately 1.2 million locations with BDS demand whereas there are fewer than 16,000 price cap incumbent LEC wire centers.

11. In the interest in having as complete a record as possible, however, earlier this year, using data from the 2015 Collection, Commission staff included in the record the April Data Tables that show that the vast majority of locations with BDS demand are served by wire centers that were within a half mile of competitive fiber. More specifically, staff analysis demonstrates that, in 2013, 75.7% of price cap LEC wire center locations were within a half mile of

competitive fiber. INCOMPAS's own analysis confirms this finding. Commission staff determined that only 5.6% of locations with BDS demand are likely served by incumbent LEC wire centers without competitive LEC fiber within a half mile. Staff further calculated that only 2.7% of all locations with BDS demand were either likely served by wire centers without nearby competitive fiber or were themselves not within a half mile of such fiber.

12. As CenturyLink explains, the “tables confirm that competitors can connect to the vast majority of ILEC central offices, and particularly those with meaningful demand for business services, to supplement their own competitive networks.” At the same time, the April Data Tables “dramatically understate competition for these services, as cable companies and other competitors frequently bypass ILEC networks entirely, eliminating the need for them to connect to ILEC wire centers to reach end-user customers.” Moreover, the April Data Tables reflect only the competitive fiber that existed in 2013; as the record demonstrates, however, competitive fiber providers have continued to build new fiber routes in part to compete with incumbent LECs' BDS offerings.

13. Commenters challenge the validity of the Commission's April Data Tables on various grounds. For example, INCOMPAS argues that without information about the distance between wire centers and the nearest splice point or interconnection point on the competitive provider's network, the April Data Tables understate the barriers to competitive entry. INCOMPAS cites Commission precedent regarding using the distance to splice points to measure competition, and notes the lack of splice point data in the record.

14. However, given the fact that fiber operators commonly install interconnection points at regular intervals on the fiber they deploy, measuring the distance to fiber is a reasonable proxy for measuring the distance to a splice point. As CenturyLink explains, installing an interconnection point on fiber is neither “particularly burdensome [nor] otherwise unachievable If there is sufficient demand, carriers will naturally install interconnection points nearby when

they deploy fiber, and even if they do not, it is still possible to add new splice points.” It further observes that “[e]stablishing a splice point generally does not significantly increase the cost of adding a new customer location to CenturyLink’s network As a result, the need for a new splice point typically does not negatively affect the business case for deploying a fiber lateral to serve a new customer” These statements are unrebutted in the record. We believe the data on fiber locations represents the best data available to the Commission and find they provide a reasonable means by which to estimate competitive pressure generated by the proximity of competitive fiber.

15. We also find the suggestion that it is improper to include cable fiber in the April Data Tables, since cable providers do not collocate in incumbent LEC wire centers to sell transport, to be premised on an unnecessarily narrow and outdated view of competition that requires interconnection with the incumbent LEC. It misses the competitive pressure that nearby cable fiber exerts on the incumbent LEC regardless of whether it interconnects with the incumbent LEC. Competitive LEC fiber, including cable fiber, remains relevant to a competitive analysis regardless of whether competitors connect with incumbent facilities or bypass them.

16. We reaffirm the Commission’s finding that the presence or reasonable proximity of a single competitor’s facilities represents competition given the high sunk cost nature of BDS. At the same time, as some commenters have pointed out, there are major urban areas with as many as 28 competitive transport providers, and second tier metropolitan areas with more than a dozen separate competitive transport providers. While these data are discrete in nature, they are unquestionably relevant to our assessment of TDM transport competition. That some of these competitive providers may not currently “offer a substitute for interoffice DS1 and DS3 facilities in the MSA” is of limited relevance given our view that TDM transport services are competitive due in part to the potential for providers to deploy transport when competitive LEC fiber exists within a half mile of BDS demand. Moreover, the willingness of so many competitors to supply

service in these markets is a general indicator of competitiveness and the increasing use of non-incumbent LEC networks for transport.

17. The 2015 Collection and other data submitted into the record before the adoption of the 2017 BDS Order necessarily do not account for competitive facilities deployed over the last several years. More recent record submissions show that competition for BDS transport services has continued to grow. The current record shows, for example, that cable operators have “evolved from new entrants to established providers of BDS” In the BDS Order, the Commission identified cable service as a substitute for BDS in areas with Metro Ethernet-enabled offerings and for lower speed TDM services but did not find “broad substitution” of cable best efforts services for BDS or “substantial performance similarities” between the two types of services. Cable now competes for the full range of BDS, and, since it almost always bypasses the incumbent LEC network when it provides service, displaces incumbent LEC transport offerings when it takes a customer. In recent years, cable operators have invested billions of dollars in their hybrid fiber coax (HFC) networks which are now available in most areas where there is BDS demand and which can be repurposed to provide various levels of BDS with only incremental investment. Comcast, for example, reports having invested billions of dollars “to increase network capacity,” resulting in “the largest facilities-based last mile alternative to the phone company.” Charter Spectrum reportedly spent over \$1 billion in 2018 in new fiber infrastructure to increase the density of its national fiber network. Cox is reported to be planning to invest an additional \$10 billion into its network over the next five years.

18. According to a recent industry analyst report, “[c]able companies are leveraging [their] ubiquitous HFC and rapidly expanding fiber networks to gain share in the [BDS] market.” It states that “[a]ll major [cable operators] are focused on expanding their network footprints and speed offerings, and Comcast, Cox and other cable companies are working to increase the capacities of their Ethernet over HFC offerings.” The report also projects that cable providers are

“expected to see share gains across markets, with continued expansion and upgrades of fiber and HFC footprint and focus on growing business and wholesale traction.”

19. As a result of this aggressive investment, cable’s BDS revenues and share of BDS revenues have steadily increased. Cable operators’ BDS revenues more than doubled from approximately \$8 billion in 2013 to more than \$18 billion in 2018 and could reach \$20 billion by the end of 2019. Atlantic-ACM projects that from 2017 to 2023, cable operators’ share of all BDS revenues will grow from 19.7% to an estimated 30.7%. In 2017 alone, cable BDS revenue growth was 10.6%.

20. Traditional competitive LEC’s BDS offerings have also increased over the past two years. As one analyst report declares, “CLECs are aggressively expanding their footprints via network builds or M&A while ILECs are attempting to remain competitive by making major investments to prepare their networks for 5G.” Fiber-based competitive LECs such as Zayo and Uniti Fiber have deployed significant additional facilities and continue to grow their share of BDS revenues. Zayo reported a 38% increase in fiber route miles from December 2015 (95,000 miles) to November 2018 (131,100 miles). Moreover, as commenters have also observed the increased use of carrier-neutral facilities such as third-party carrier hotels and data centers that bypass incumbent LEC facilities, further suggesting competitive pressure from competitive LECs.

21. As the Commission did in the BDS Order, we consider packet-based transport services to be broadly substitutable for TDM-based transport services. Substitution between these two types of services is generally in one direction, and we find that “circuit- and packet-switched business data services that offer similar speed, functionality, and quality of service characteristics fall within the same product markets” for the purposes of the market analysis

relevant here. Indeed, TDM transport services can be carried over fiber, so fiber providers can offer customers TDM services.

22. There is an ongoing steady decline in demand for TDM transport and increase in demand for packet-based alternatives. One analyst forecasts that legacy TDM transport will decline from \$3.2 billion to \$1.2 billion from 2017 to 2023. This forecast is supported by data submitted to the record by BDS providers. For example, according to CenturyLink, between 2015 and 2018, its incumbent LEC revenues for TDM transport dropped 9% annually and demand for DS1 and DS3 services “has been declining for years as customers migrate to Ethernet and other packet-based services that are easily scalable to meet their growing bandwidth needs.” Similarly, AT&T reports that its “revenues for DS1 and D[S]3 transport have continued to decline substantially since 2015 due to the availability of competitive alternatives and the fact that many competitors (e.g., cable companies) do not purchase much transport from ILECs at all.”

23. In light of the record of continued aggressive deployment by competitors of BDS-capable network facilities since the BDS Order, we find unpersuasive arguments that our analysis fails to sufficiently consider the barriers to supplying TDM transport and whether those barriers identified are significant enough to prevent robust competition. As the Commission previously explained, while entry barriers to BDS supply may seem high, competitors nonetheless frequently choose to make significant investment to enter these markets. And, given that transport services typically connect points of traffic aggregation and therefore offer relatively greater revenue opportunity than end user channel terminations, barriers to entry to supply transport are lower than for other types of BDS. Additionally, because fiber connections are a sunk cost, and it is efficient to deploy many more strands than are initially used, once competitors deploy facilities, they have every incentive to price competitively (as do the incumbents against whom they compete).

24. Some commenters’ arguments about barriers to entry are based on an

unjustifiably narrow view of BDS transport competition which is premised on competition that is interconnected with, and therefore dependent on, incumbent LEC infrastructure. This argument ignores substantial and growing evidence that competitors often bypass the incumbent LEC network entirely. Indeed, as the Commission has previously recognized, “cable operators self-provision all aspects of their BDS, including transport functionality,” and therefore do not rely on incumbent LEC central offices to offer competitive TDM transport services and competitive LECs are increasingly bypassing incumbent LEC infrastructure. As AT&T explains, “CLECs do not need to collocate in ILEC central offices, or to replicate ILEC transport paths, in order to provide a competitive alternative that disciplines ILEC rates.”

25. Finally, we find unpersuasive the assertion by some commenters that incumbent LECs retain market power over DS1 and DS3 channel terminations, which they contend extends to TDM transport, thus rendering some TDM transport markets noncompetitive. As an initial matter, the Commission’s competitive market test in the BDS Order, which was upheld on appeal by the Eighth Circuit, determined that 91.1% of locations with DS1 and DS3 end user channel termination demand were competitive. In support of their position, these commenters argue that the market analysis conducted by Dr. Marc Rysman on behalf of the Commission showed that incumbent LECs exercised some market power over DS1 and DS3 services. The conclusions they cite from the Rysman study, however, were specific to DS1 and DS3 channel terminations. Moreover, as the Commission explained in the BDS Order, the data used in Dr. Rysman’s analysis were examined by peer reviewers and were found to be “too noisy to draw any firm conclusions,” and therefore the Commission chose not to rely on these to draw

conclusions about markets for DS1 and DS3 services. Additionally, Dr. Rysman's analysis was based on pricing data for full circuit service which combined data for channel termination, transport, and other services. Dr. Rysman did not attempt to draw conclusions specific to TDM transport. In fact, Dr. Rysman removed from his study all data specific to standalone transport services "because the cost structure behind providing transport is likely to be substantially different from providing service to end-user premises and therefore would make comparisons of prices less meaningful."

B. Removing Ex Ante Pricing Regulation

26. Given our finding that the supply of TDM transport services is sufficiently competitive across the country that the continued application of ex ante pricing regulation would do more harm than good, and consistent with the recommendation made by numerous commenters, we reaffirm the Commission's decision in the BDS Order to remove ex ante pricing regulation of BDS TDM transport and other transport (i.e., non-end user channel termination) services in price cap areas nationwide. The record does not support allegations made by some commenters that "stark differences" in competitive conditions in different areas preclude the nationwide removal of ex ante pricing regulation. It does demonstrate, as the Commission recognized in the BDS Order, that an extremely small percentage of buildings with BDS demand in price cap areas may face the prospect of no regulatory constraint on incumbent LEC prices for TDM transport and no immediate prospect of a competitive alternative. We believe, however, that the costs of imposing ex ante pricing regulation far exceed the benefits of continued regulation of price cap LECs' TDM transport services. Imposing inflexible and burdensome ex ante pricing regulation on TDM transport services would harm the dynamic competitive nature of these markets, could lead to a decrease in new entrants, and would likely delay the transition from TDM- to IP-based offerings. To the limited extent there remain locations where there is not an immediate competitive threat, the Commission has previously explained that we anticipate

reasonably competitive outcomes in the short- to medium-term (i.e., over several years) will discipline prices. As a result, we find that such locations do not preclude our adoption of a nationwide solution. Moreover, as the Commission previously recognized, “our goal is not absolute mathematical precision but an administratively feasible approach that avoids imposing undue regulatory burdens on this highly competitive segment of the market.” Refraining from pricing regulation for TDM transport services in price cap areas nationally achieves the proper balance between precision and administrability, particularly given the fact that parties continue to be able to file complaints with the Commission pursuant to section 208 of the Act.

27. As a result, we do not support proposals that we adopt a competitive market test for TDM transport services. The fact that the Commission adopted a competitive market test for TDM channel terminations in price cap areas does not compel the adoption of a competitive market test for TDM transport services. The Commission has always distinguished its analysis and regulation of these markets and presuming that a test for one set of services means that a competitive market test for the other is necessary or even possible, wrongly conflates the two. Indeed, commenters that support a competitive market test for TDM transport concede that a “competitive market test for transport should be distinct from that used for channel termination given the differences between the two types of services.” Moreover, they claim that the record “does not[] contain data on the extent of competition by different transport service providers” and urge the Commission to “further develop the record.”

28. We see no benefit to prolonging this long-running proceeding to conduct a further data collection for TDM transport services. Given the very significant burdens and delays involved in the Commission’s 2015 Collection, the benefits of collecting additional data on TDM transport competition to develop a separate TDM transport competitive market test would need to be substantial to justify the burdens of such a collection. Commission staff analysis of the 2015 Collection shows that only 2.7% of locations with BDS demand in price cap areas in 2013 were

neither served by a wire center that was within a half mile of competitive fiber nor were themselves within a half mile of competitive fiber. With competition this extensive, the burdens of a major data collection and of developing and administering a competitive market test for TDM transport services clearly outweigh the benefits.

29. This is particularly true because some commenters arguing for a competitive market test urge us to adopt a route-based test for TDM transport services based on transport routes connecting incumbent LEC wire centers. They argue that the relevant geographic market for TDM transport services is “the route between two ILEC end offices and not the area within a given distance from a customer’s location.” The providers that suggest adoption of such a test do not explain—even in broad terms—how it would be structured, on what evidence it could be based, or how it could be feasibly administered. Neither do they acknowledge that the incumbent LEC-centric nature of such a test would not account for competitors that bypass incumbent LEC infrastructure. Nor do they take into account the fact that price cap LECs “generally do not price their transport services on a route-by-route basis.” Given the evidence of extensive and still growing competition for transport services in the vast majority of the areas served by price cap carriers where there is BDS demand, we cannot justify imposing burdensome new ex ante pricing regulation on BDS offerings based on the results of a test that will not actually be able to identify where there are failures in the transport market, but could inhibit investment in this dynamic marketplace.

30. We also reject arguments made by some commenters that nationwide deregulation of TDM transport will have secondary consequences for the pricing of channel terminations in those price cap counties that the BDS Order deemed insufficiently competitive to warrant removal of ex ante pricing regulation. These parties argue that eliminating pricing regulations for TDM transport would allow price cap LECs to evade the price caps that remain on channel terminations in areas deemed non-competitive by allowing them to impose offsetting rate

increases on TDM transport services in those counties. We find this reasoning flawed. The argument assumes that, if a provider tried to charge supracompetitive rates on transport services to compensate for price-capped channel terminations, competitors would not respond to such increased transport prices with additional investment in transport facilities. However, given the evidence of widespread competitive entry for BDS transport, there is reason to believe that the likely result of a price cap LEC charging supracompetitive rates on transport services would be the entry of a competitor with the capacity to bypass facilities being added in response. The competitive LECs' view of the BDS marketplace ignores the evidence of competitive pressure in the record. Moreover, in the more than two years since the adoption of the BDS Order, ex ante pricing regulation of TDM transport has been largely removed in price cap areas, even in counties where the Commission retained price cap regulation over price cap LECs' DS1 and DS3 channel terminations. Yet, competitive LECs cite no instance where deregulating transport rates has undercut price cap regulation of channel terminations. In light of this experience, the competitive LECs' concern seems speculative.

31. Refraining from pricing regulation for TDM transport services nationwide achieves the proper balance between precision and administrability. It also avoids unnecessary disruption of existing BDS transport sales arrangements. And, as one commenter explains, the "risks of overregulation of these services would outweigh any marginal benefit from" reinstating ex ante pricing regulation "in this highly competitive sector, by artificially tamping down TDM transport rates, thereby deterring competitive entry and slowing the IP migration." Instead, we believe that providing regulatory relief in this market segment will foster conditions that will continue to encourage competitive entry and provide incentive for further investment in fiber transport facilities.

32. Finally, as we previously observed in the BDS Order, price cap LECs' TDM transport services continue to be subject to sections 201, 202 and 208 of the Communications

Act. These statutory provisions prohibit carriers from imposing rates, terms, and conditions that are unjust, unreasonable, or unreasonably discriminatory.

C. Forbearance from Tariffing

33. To effectuate the approach we take to TDM transport, and consistent with the approach the Commission took in the BDS Order, pursuant to section 10 of the Communications Act, we forbear from applying section 203 of the Act and our tariffing requirements to price cap incumbent LECs in their provision of BDS TDM transport services. This forbearance relieves price cap LECs of the requirement to file interstate tariffs for these services nationwide.

34. The Commission has a long history of granting price cap LECs forbearance from tariffing requirements for various of their BDS offerings. More than a decade ago, the Commission provided grants of forbearance to price cap LECs for their packet-switched and optical transmission BDS. Two years ago, in the BDS Order, the Commission granted price cap LECs forbearance from the Act's tariffing obligations with respect to the provision of packet-based and higher speed TDM BDS, lower speed TDM transport, and DS1 and DS3 end user channel termination services in counties deemed competitive by the Commission's competitive market test. Based on the record before us, we find that the statutory test for granting forbearance from tariffing obligations for price cap LECs' TDM transport services has been met.

35. First, we find that the widespread existence of competitive alternatives to incumbent LECs' BDS TDM transport offerings means that the application of section 203 of the Act is not necessary to ensure that the charges and practices for price cap LECs' transport services are just and reasonable and not unreasonably discriminatory. Congress enacted section 203 of the Act in an era when tariffs "were required to protect consumers from unjust, unreasonable, and discriminatory rates in a virtually monopolistic market." Over time, the Commission progressively modified its regulation of price cap LECs' BDS to reflect increasing levels of competition in the supply of BDS, and therefore, the reduced need for the protections

tariffs that provide. The record demonstrates that current market forces will better ensure that prices for TDM transport offered by price cap LECs are just and reasonable and not unreasonably discriminatory than (necessarily) blunt regulatory measures.

36. Second, for many of the same reasons, we find that enforcement of our tariffing requirements for price cap LECs' BDS TDM transport services is "not necessary for the protection of consumers," and forbearance will benefit consumers. Widespread and increasing competition to BDS services will drive down prices and provide competitive alternatives to those services, which in turn benefits consumers. Moreover, forbearance from tariffing will allow price cap carriers to respond more quickly to competition and be more innovative in the services they offer, also benefitting consumers. Additionally, price cap LEC BDS TDM transport offerings will remain subject to sections 201, 202, and 208 of the Act and to our enforcement of those provisions through the section 208 complaint process.

37. Third, we find that granting forbearance for price cap LECs' BDS TDM transport services from section 203 of the Act is consistent with the public interest and will promote competitive market conditions. As the Commission found in the BDS Order, forbearance from tariffing obligations for TDM transport will promote further BDS competition and deployment in price cap LEC areas. Moreover, tariffing can adversely impact competitive markets by reducing a carrier's incentives to offer price discounts, delaying and increasing the costs of innovation, and inhibiting a carrier from tailoring services to best meet customers' needs. Further, tariffing itself is not without its costs. Forbearing from section 203 and our tariffing rules will reduce unnecessary administrative costs, which can be significant, and allow carriers to redirect their resources to deploying service capabilities and providing service. We continue to adhere to our view that disparate forbearance treatment of carriers providing the same or similar services is not in the public interest, as it creates distortions in the marketplace that may harm consumers. Accordingly, the continued application of section 203 is unnecessary under sections 10(a)(3) and

10(b). Because we find that each of the elements of the section 10 forbearance analysis is satisfied, we must grant forbearance from section 203 tariffing requirements.

D. Transition to Mandatory Detariffing

38. To ensure an orderly transition to a fully detariffed regulatory regime for price cap LECs' TDM transport offerings, we adopt mechanisms that align with those the Commission adopted in the BDS Order. As in the BDS Order, we also require competitive LECs, which are subject to permissive detariffing, to detariff their remaining transport BDS offerings by the end of this transition. In so doing, we recognize that many price cap LECs have already detariffed their TDM transport in response to the BDS Order and these services have remained detariffed given the Eighth Circuit's temporary stay of its partial remand. For those price cap LECs that have not already detariffed their TDM transport, we adopt a new transition period that will begin on the effective date of this Order (which will be 30 days after publication of this Order in the Federal Register) and will end on August 1, 2020, the date of the transition period mandated by the BDS Order for mandatory detariffing.

39. During this transition, tariffing for TDM transport services by carriers will be permissive—we will accept new tariffs and revisions to existing tariffs for the affected services. Price cap LECs will no longer be required to comply with price cap regulation for their TDM transport services, and once these rules are effective, carriers that wish to continue filing tariffs under the permissive detariffing regime are free to modify such tariffs consistent with this Order. Carriers, including non-incumbent LECs, may remove the relevant portions of their tariffs for the affected services at any time during the transition. Once the transition ends, no price cap carrier may file or maintain any interstate tariffs for affected business data services.

40. Price cap incumbent LECs and competitive LECs may not file or maintain any interstate tariffs for affected business data services once the transition ends. This will prevent carriers from obtaining "deemed lawful" status for tariff filings that are not accompanied by cost

support and invoking the filed-rate doctrine in contractual disputes with customers. Business data service providers will also be prevented from picking and choosing when they are able to invoke the protections of tariffs.

41. We do not intend our actions to disturb existing contractual or other long-term arrangements—a contract tariff remains a contract even if it is no longer tariffed. As we stated in the BDS Order, contract tariffs, term and volume discount plans, and individual circuit plans do not become void upon detariffing. All carriers are to act in good faith to develop solutions to ensure rates remain just and reasonable.

42. The rule amendments we adopt today relating to TDM transport are substantively the same as those the Commission adopted in the BDS Order, and as such, impose the same obligations on carriers as the existing rules. We make only minor clarifying changes to the rules. For example, we amend the rules to specify that competitive LECs must detariff their business data services by August 1, 2020.

III. PROCEDURAL MATTERS

43. Paperwork Reduction Act Analysis—This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

44. Congressional Review Act—The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

45. **Final Regulatory Flexibility Analysis**--As required by the Regulatory by the Regulatory Flexibility Act of 1980, as amended (RFA) an Initial Regulatory Flexibility Analysis

(IRFA) was incorporated into the Second Further Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (Second Further Notice) for the Time Division Multiplexing (TDM) transport business data services (BDS). The Commission sought written public comment on the proposals in the Second Further Notice, including comment on the IRFA. The Commission received no comments on the IRFA. Because the Commission amends its rules in this Report and Order, the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.

A. Need for, and Objectives of, the Proposed Rules

46. In the Second Further Notice, the Commission proposed changes to, and sought comment on, the appropriate regulatory treatment of TDM transport BDS offerings offered by price cap local exchange carriers (LECs). The Commission proposed to remove ex ante pricing regulation from TDM transport business data services offered by price cap LECs. In this Order, we promote competition in the market for BDS TDM transport services by adopting a regulatory framework for those services that better reflects the dynamic competitive nature of price cap LECs' TDM transport markets.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

47. We analyze the market for TDM transport in areas served by price cap incumbent local exchange carriers and conclude that the record in this proceeding demonstrates widespread, significant and growing competition in this segment of the BDS market. We therefore grant nationwide relief from ex ante pricing regulation of these carriers' TDM transport services, forbear from applying Section 203 tariffing requirements to these services, and adopt permissive detariffing for price cap LECs' TDM transport services for a transition period, followed by mandatory detariffing of these services.

48. The Commission did not receive comments specifically addressing the rules and policies proposed in the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

49. The Chief Counsel did not file any comments in response to this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

50. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and by the rule revisions on which the FNPRMs seek comment, if adopted. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act. A “small-business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

1. Total Small Entities

51. Small Businesses, Small Organizations, Small Governmental Jurisdictions. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.

52. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in

its field.” Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

53. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.” U.S. Census Bureau data from the 2012 Census of Governments indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37,132 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that the majority of these governments have populations of less than 50,000. Based on these data we estimate that at least 49,316 local government jurisdictions fall in the category of “small governmental jurisdictions.”

2. Broadband Internet Access Service Providers

54. Internet Service Providers (Broadband). Broadband Internet service providers include wired (e.g., cable, DSL) and VoIP service providers using their own operated wired telecommunications infrastructure fall in the category of Wired Telecommunication Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. The SBA size standard for this category classifies a business as small if it has 1,500 or fewer employees. U.S. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.

Consequently, under this size standard the majority of firms in this industry can be considered small.

3. Wireline Providers

55. Wired Telecommunications Carriers. The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.” The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

56. Incumbent Local Exchange Carriers (Incumbent LECs). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent LEC services. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. A total of 1,307 firms reported

that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees.

57. Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on this data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

58. We have included small incumbent LECs in this present RFA analysis. As mentioned above, a “small business” under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.” The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope. We have therefore included

small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

59. Interexchange Carriers (IXCs). Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined above. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicates that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed rules.

60. Local Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities.

61. Toll Resellers. The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access

and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

62. Other Toll Carriers. Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that

most Other Toll Carriers are small entities that may be affected by rules adopted pursuant to the Second Further Notice.

63. Operator Service Providers (OSPs). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities.

4. Wireless Providers – Fixed and Mobile

64. Wireless Telecommunications Carriers (except Satellite). This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

65. The Commission's own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to

internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service, and Specialized Mobile Radio Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

66. **Wireless Communications Services.** This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these definitions.

67. **Wireless Telephony.** Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As explained, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, a little less than one third of these entities can be considered small.

5. Cable Service Providers

68. Because section 706 requires us to monitor the deployment of broadband using any technology, we anticipate that some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

69. **Cable and Other Subscription Programming.** This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of

programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (e.g. limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA has established a size standard for this industry stating that a business in this industry is small if it has 1,500 or fewer employees. The 2012 Economic Census indicates that 367 firms were operational for that entire year. Of this total, 357 operated with less than 1,000 employees. Accordingly, we conclude that a substantial majority of firms in this industry are small under the applicable SBA size standard.

70. Cable Companies and Systems (Rate Regulation). The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide. Industry data indicate that there are currently 4,600 active cable systems in the United States. Of this total, all but eleven cable operators nationwide are small under the 400,000-subscriber size standard. In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records. Thus, under this standard as well, we estimate that most cable systems are small entities.

71. Cable System Operators (Telecom Act Standard). The Communications Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." There are approximately 52,403,705 cable video subscribers in the United States today. Accordingly, an operator serving fewer than 524,037 subscribers shall

be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate. Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

72. All Other Telecommunications. “All Other Telecommunications” is defined as follows: This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less. For this category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million. Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

73. The rule changes in the Order include reducing the unnecessary regulatory burdens and inflexibility of ex ante pricing regulation and tariffing requirements for price cap LECs' TDM transport services since the Commission has found there is sufficient competition to justify reduced regulation. These rule changes provide additional incentives for competitive entry, network investment and the migration to IP-based network technologies and services.

74. The transition period for detariffing price cap LECs' TDM transport services will begin on the effective date of this Order (thirty (30) days after Federal Register publication). Given our desire to align the transition periods we adopt here with those the Commission already adopted in the BDS Order, the transition periods for detariffing TDM transport services will end on the same date that the transition period mandated by the BDS Order for price cap LECs' other BDS services is scheduled to end—August 1, 2020.

75. Specifically, the Order eliminates ex ante pricing regulation and tariffing requirements for price cap LECs' TDM transport BDS. This will eliminate reporting, recordkeeping, and other compliance requirements for any price cap LEC.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

76. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

77. The rule changes in this Order reduce the economic impact of the Commission's rules on price cap LECs by freeing price cap LECs from ex ante pricing regulation for their TDM

transport offerings, including the requirement to tariff their TDM transport services. These rule changes will significantly minimize the economic impact of our rules on price cap LECs.

G. Report to Congress

78. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register. Final Regulatory Flexibility Analysis

79. As required by the Regulatory by the Regulatory Flexibility Act of 1980, as amended (RFA) an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the Second Further Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (Second Further Notice) for the Time Division Multiplexing (TDM) transport business data services (BDS). The Commission sought written public comment on the proposals in the Second Further Notice, including comment on the IRFA. The Commission received no comments on the IRFA. Because the Commission amends its rules in this Report and Order, the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.

A. Need for, and Objectives of, the Proposed Rules

80. In the Second Further Notice, the Commission proposed changes to, and sought comment on, the appropriate regulatory treatment of TDM transport BDS offerings offered by price cap local exchange carriers (LECs). The Commission proposed to remove ex ante pricing regulation from TDM transport business data services offered by price cap LECs. In this Order, we promote competition in the market for BDS TDM transport services by adopting a regulatory framework for those services that better reflects the dynamic competitive nature of price cap LECs' TDM transport markets.

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81. We analyze the market for TDM transport in areas served by price cap incumbent local exchange carriers and conclude that the record in this proceeding demonstrates widespread, significant and growing competition in this segment of the BDS market. We therefore grant nationwide relief from ex ante pricing regulation of these carriers' TDM transport services, forbear from applying Section 203 tariffing requirements to these services, and adopt permissive detariffing for price cap LECs' TDM transport services for a transition period, followed by mandatory detariffing of these services.

82. The Commission did not receive comments specifically addressing the rules and policies proposed in the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

83. The Chief Counsel did not file any comments in response to this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

84. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and by the rule revisions on which the FNPRMs seek comment, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act. A "small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

1. Total Small Entities

85. Small Businesses, Small Organizations, Small Governmental Jurisdictions. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.

86. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

87. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." U.S. Census Bureau data from the 2012 Census of Governments indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37,132 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that the majority of these governments have populations of less than 50,000. Based on these data we estimate that at least 49,316 local government jurisdictions fall in the category of "small governmental jurisdictions."

2. Broadband Internet Access Service Providers

88. Internet Service Providers (Broadband). Broadband Internet service providers include wired (e.g., cable, DSL) and VoIP service providers using their own operated wired telecommunications infrastructure fall in the category of Wired Telecommunication Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. The SBA size standard for this category classifies a business as small if it has 1,500 or fewer employees. U.S. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, under this size standard the majority of firms in this industry can be considered small.

3. Wireline Providers

89. Wired Telecommunications Carriers. The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.” The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such

companies having 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

90. Incumbent Local Exchange Carriers (Incumbent LECs). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent LEC services. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. A total of 1,307 firms reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees.

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Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

92. We have included small incumbent LECs in this present RFA analysis. As mentioned above, a “small business” under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.” The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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94. Local Resellers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. The Telecommunications Resellers industry

comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities.

95. Toll Resellers. The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

96. Other Toll Carriers. Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by rules adopted pursuant to the Second Further Notice.

97. Operator Service Providers (OSPs). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities.

4. Wireless Providers – Fixed and Mobile

98. Wireless Telecommunications Carriers (except Satellite). This industry comprises establishments engaged in operating and maintaining switching and transmission

facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

99. The Commission's own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service, and Specialized Mobile Radio Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

100. Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these definitions.

101. Wireless Telephony. Wireless telephony includes cellular, personal

communications services, and specialized mobile radio telephony carriers. As explained, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, a little less than one third of these entities can be considered small.

5. Cable Service Providers

102. Because section 706 requires us to monitor the deployment of broadband using any technology, we anticipate that some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

103. Cable and Other Subscription Programming. This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (e.g. limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA has established a size standard for this industry stating that a business in this industry is small if it has 1,500 or fewer employees. The 2012 Economic Census indicates that 367 firms were operational for that entire year. Of this total, 357 operated with less than 1,000 employees. Accordingly, we conclude that a substantial majority of firms in this industry are small under the applicable SBA size standard.

104. Cable Companies and Systems (Rate Regulation). The Commission has

developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide. Industry data indicate that there are currently 4,600 active cable systems in the United States. Of this total, all but eleven cable operators nationwide are small under the 400,000-subscriber size standard. In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records. Thus, under this standard as well, we estimate that most cable systems are small entities.

105. Cable System Operators (Telecom Act Standard). The Communications Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." There are approximately 52,403,705 cable video subscribers in the United States today. Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate. Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

106. All Other Telecommunications. "All Other Telecommunications" is defined as

follows: This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less. For this category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million. Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

107. The rule changes in the Order include reducing the unnecessary regulatory burdens and inflexibility of ex ante pricing regulation and tariffing requirements for price cap LECs’ TDM transport services since the Commission has found there is sufficient competition to justify reduced regulation. These rule changes provide additional incentives for competitive entry, network investment and the migration to IP-based network technologies and services.

108. The transition period for detariffing price cap LECs’ TDM transport services will begin on the effective date of this Order (thirty (30) days after Federal Register publication). Given our desire to align the transition periods we adopt here with those the Commission already adopted in the BDS Order, the transition periods for detariffing TDM transport services will end on the same date that the transition period mandated by the BDS Order for price cap LECs’ other

BDS services is scheduled to end—August 1, 2020.

109. Specifically, the Order eliminates ex ante pricing regulation and tariffing requirements for price cap LECs' TDM transport BDS. This will eliminate reporting, recordkeeping, and other compliance requirements for any price cap LEC.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

110. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

111. The rule changes in this Order reduce the economic impact of the Commission's rules on price cap LECs by freeing price cap LECs from ex ante pricing regulation for their TDM transport offerings, including the requirement to tariff their TDM transport services. These rule changes will significantly minimize the economic impact of our rules on price cap LECs.

G. Report to Congress

112. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.

IV. ORDERING CLAUSES

113. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 1, 2, 4(i)–(j), 10, 201(b), 202(a), 403, of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 152, 154(i)–(j), 160, 201(b), 202(a), 403, 1302, this Report and Order on Remand in WC Docket No. 16-143, GN Docket No. 13-5, WC Docket No. 05-25, and RM-10593 IS ADOPTED and SHALL BE EFFECTIVE thirty (30) days after publication in the Federal Register.

114. IT IS FURTHER ORDERED that Parts 61 and 69 of the Commission’s rules, 47 CFR Parts 61 and 69, ARE AMENDED as set forth in Appendix A, and that such rule amendments SHALL BE EFFECTIVE thirty (30) days after publication of this Report and Order on Remand in the Federal Register.

115. IT IS FURTHER ORDERED that, pursuant to sections 402 and 405 of the Communications Act, 47 U.S.C. §§ 402, 405, the date of “public notice” with respect to this Report and Order on Remand of all actions taken herein shall be the date that a summary of this Report and Order on Remand is published in the Federal Register. The period for filing petitions for reconsideration or petitions for judicial review of all actions taken herein shall commence on that date. Section 1.4 of the Commission’s rules, 47 CFR § 1.4, is hereby waived to the extent inconsistent with this paragraph.

116. IT IS FURTHER ORDERED that the Commission’s Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order on Remand to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

117. IT IS FURTHER ORDERED, that the Commission’s Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order on

Remand, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 61

Communications, Common carriers, Reporting and recordkeeping requirements,
Telephone

47 CFR Part 69

Communications, Common carriers, Reporting and recordkeeping requirements,
Telephone

FEDERAL COMMUNICATIONS COMMISSION

Marlene Dortch

Secretary

FINAL RULES

For the reasons set forth in the preamble, the Federal Communications Commission amends parts 61 and 69 of title 47 of the CFR, as follows:

PART 61 – TARIFFS

1. The authority citation for part 61 continues to read as follows:

Authority: 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 403, unless otherwise noted.

2. Section 61.201 is amended by revising paragraph (a)(3) to read as follows:

§ 61.201 Detariffing of price cap local exchange carriers.

(a) * * *

(3) Any transport services as defined in § 69.801(j) of this chapter;

3. Section 61.203 is amended by revising paragraph (b) to read as follows:

§ 61.203 Detariffing of competitive local exchange carriers.

(b) The detariffing must be completed by August 1, 2020.

PART 69 – ACCESS CHARGES

4. The authority citation for part 69 continues to read as follows:

Authority: 47 U.S.C. §§ 154, 201, 202, 203, 205, 218, 220, 254, 403, unless otherwise noted.

5. Section 69.807 is amended by revising paragraph (a) to read as follows:

§ 69.807 Regulatory relief.

(a) Price cap local exchange carrier TDM transport, end user channel terminations in markets deemed competitive, and end user channel terminations in grandfathered markets for a price cap local exchange carrier that was granted Phase II pricing flexibility prior to June 2017, are granted the following regulatory relief:

- (1) Elimination of the rate structure requirements contained in subpart B of this part;
- (2) Elimination of price cap regulation; and
- (3) Elimination of tariffing requirements as specified in § 61.201 of this chapter.
